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### Mapping the Courts: Understanding the Due Process Application in Campus Investigations

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# Mapping the Courts: Understanding the Due Process Applications in Campus Investigations

Presented By:

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*Rowan University 7<sup>th</sup> Annual Title IX Summit*

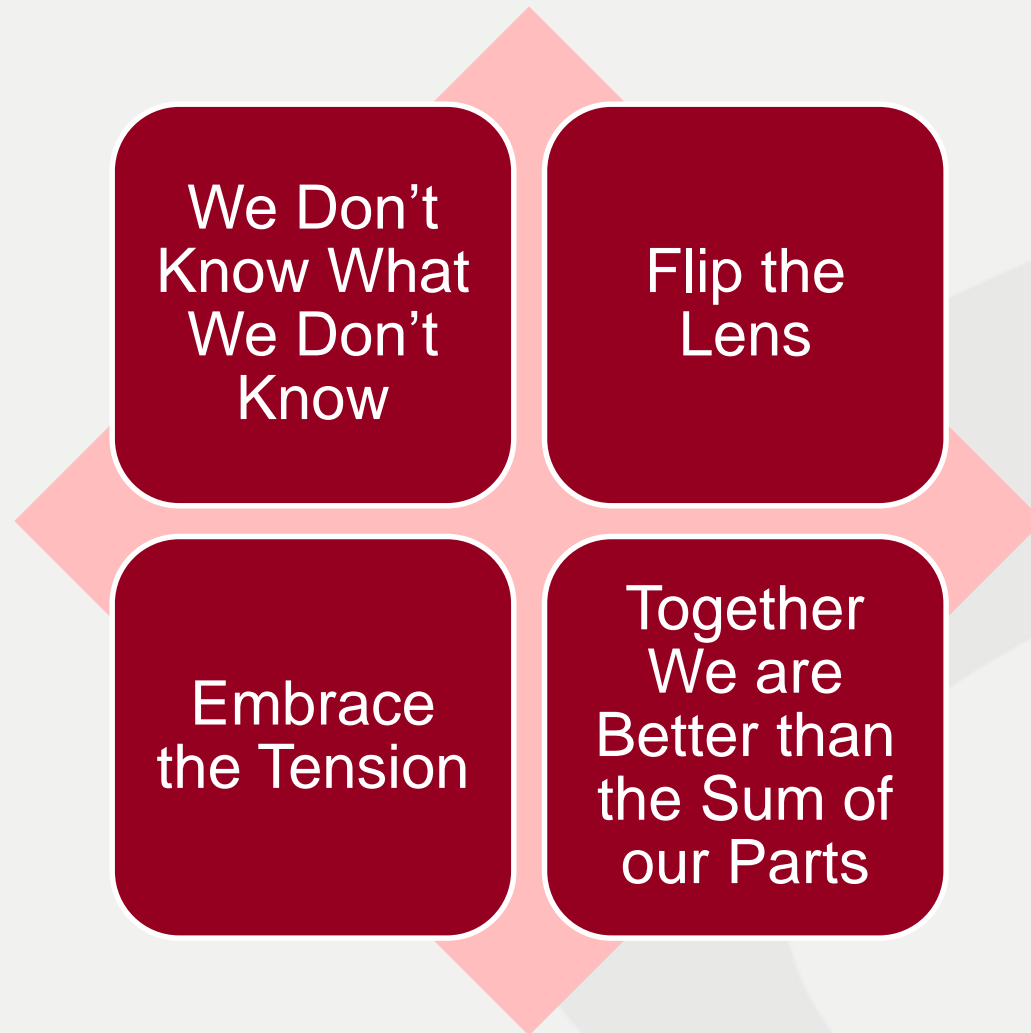
*June 4, 2019*

# Abstract

- This session will address the emerging case law across the country that is shaping the future of college and university disciplinary proceedings.
- It will examine recent holdings on due process, the right to confrontation and cross-examination, and other investigative challenges.
- The session will provide an overview of investigative models and discuss the pros and cons of single investigator, hearing and hybrid models in the face of evolving expectations.
- The session will also consider the impact of OCR guidance and direction, provide examples of effective policies and procedures, and offer practical implementation advice.

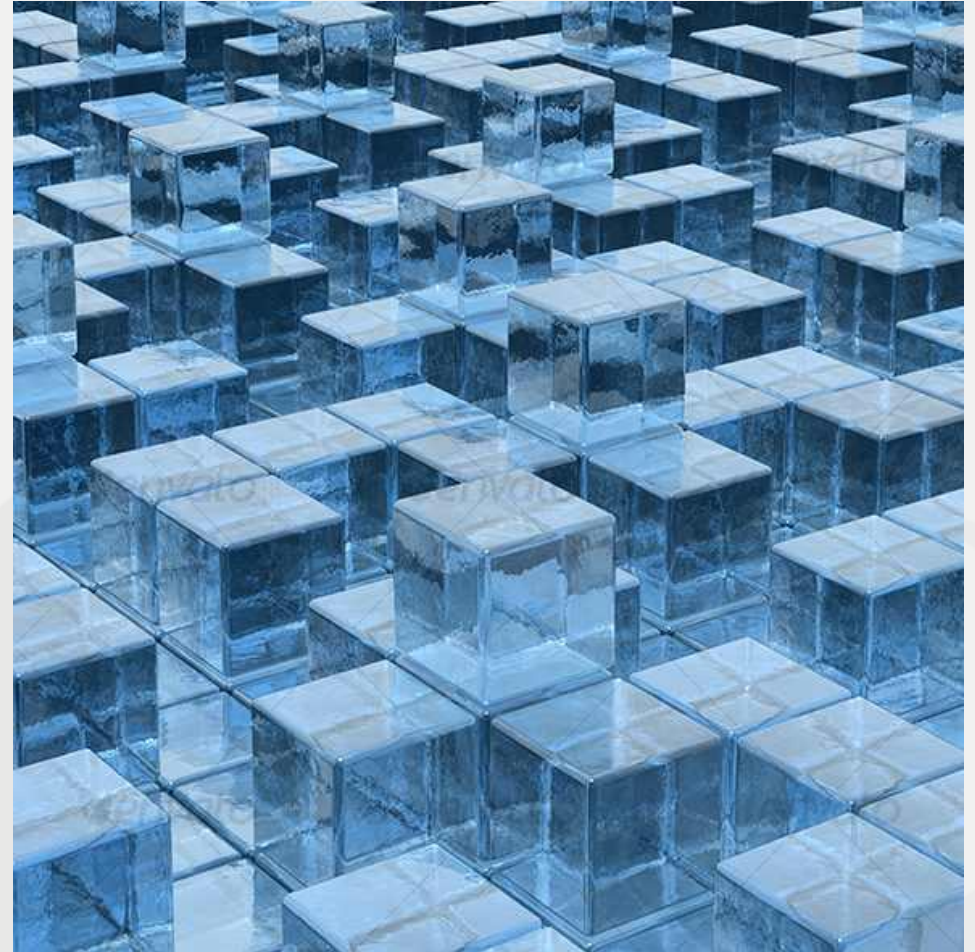
# THE CONTEXT

# Framing the Conversation

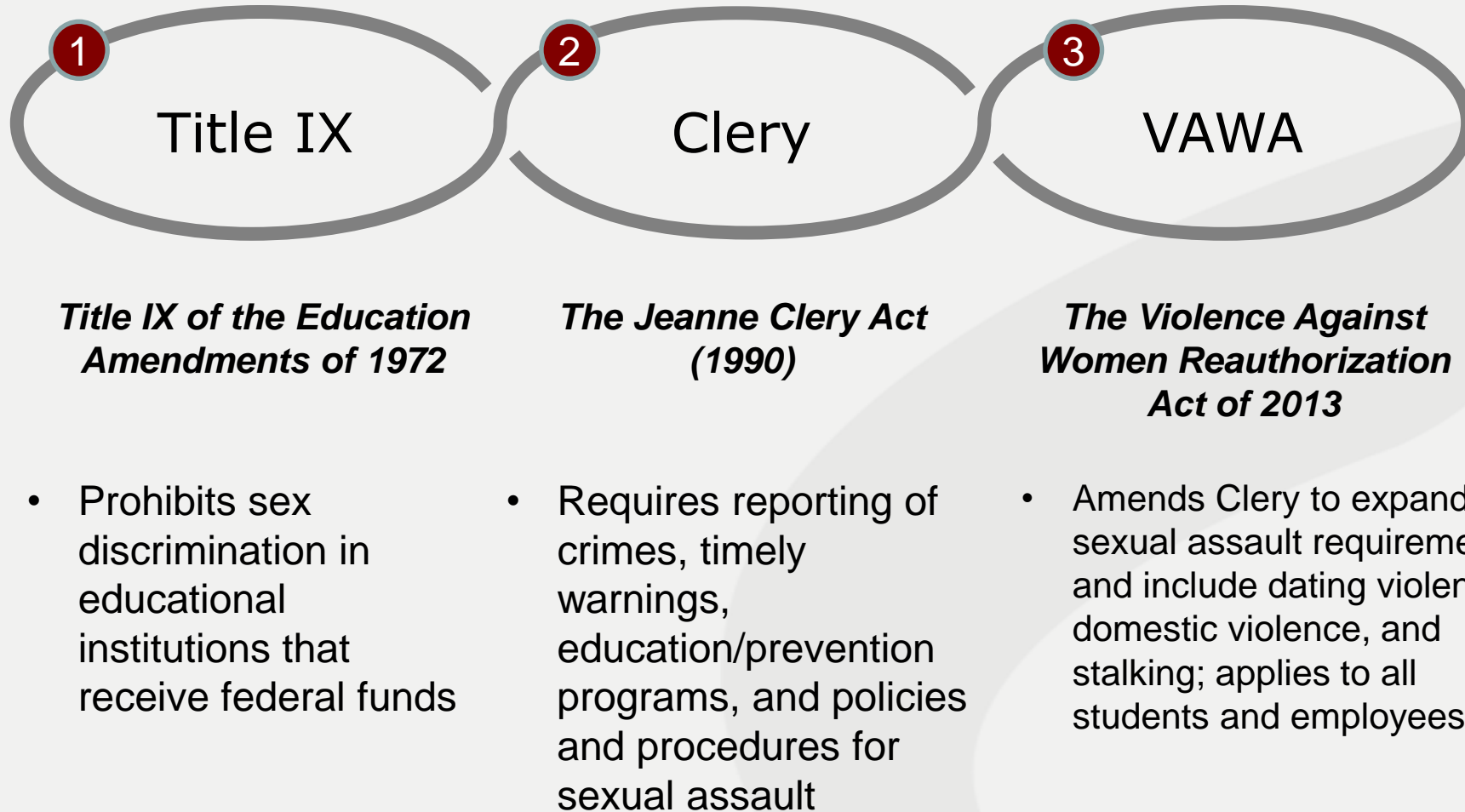


# The Context

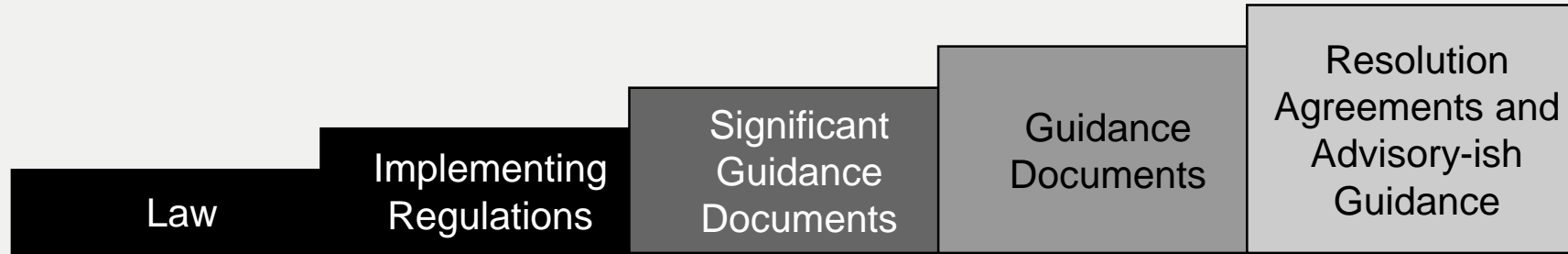
- Regulatory Framework
- Dynamics of Trauma & Sexual and Gender-Based Harassment and Violence
- Individual Culture, Climate, History, Resources, Policies, Procedures, Personnel and Values of the Institution



# Federal Regulatory Framework



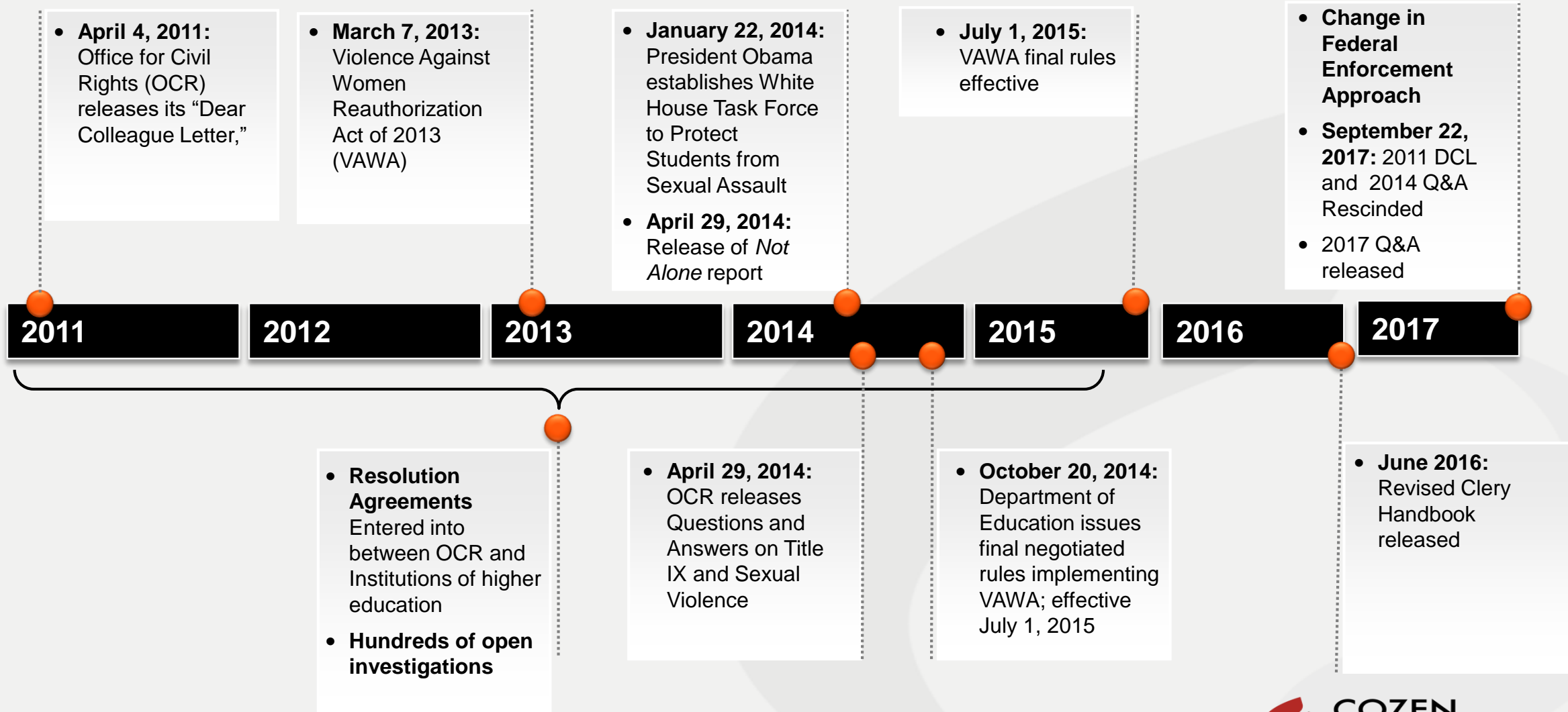
# The Hierarchy



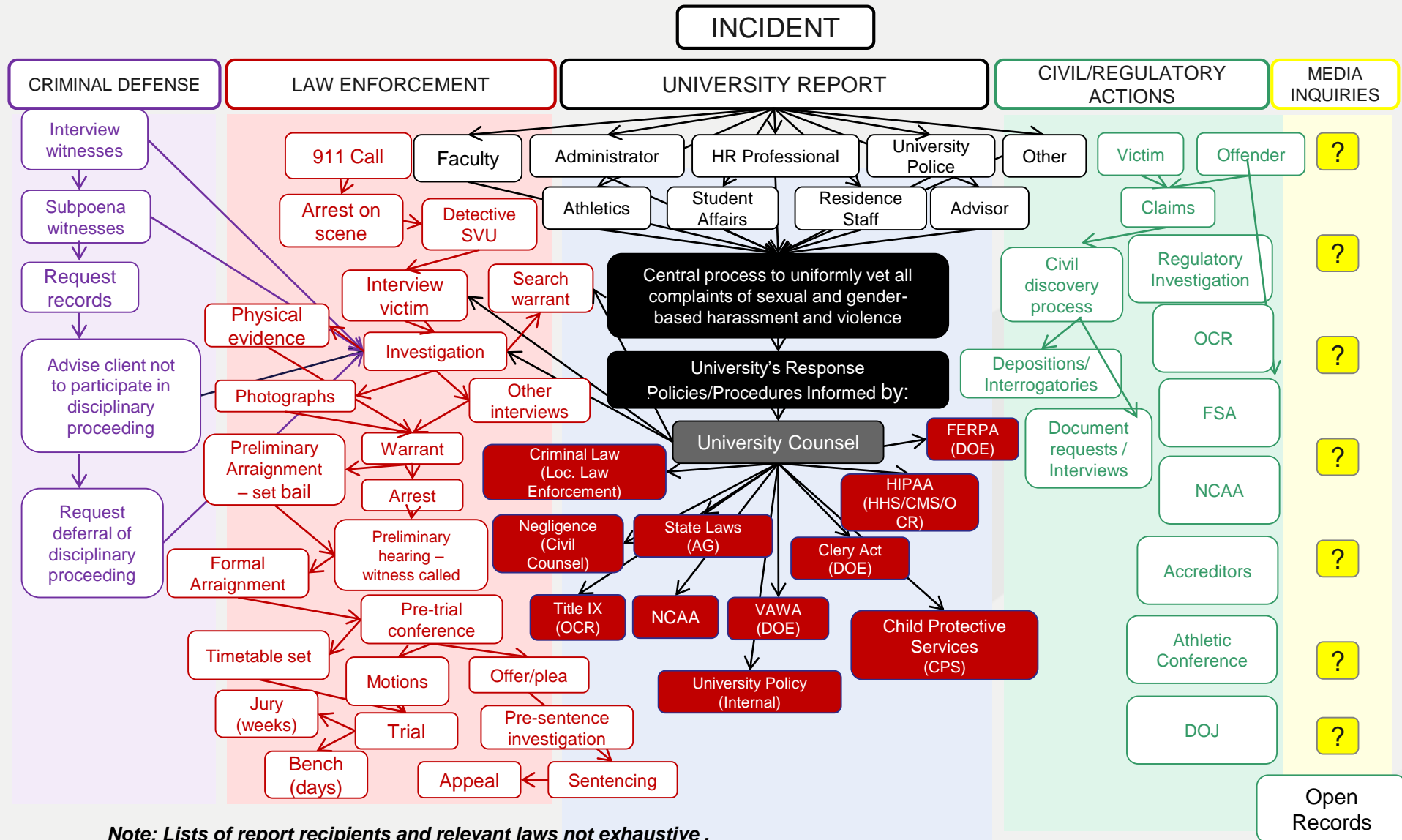
- Title IX
- Title IX Implementing Regulations
- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
  - Bullying
  - Hazing
  - Title IX Coordinator
  - Retaliation
- Resolution Agreements
- White House Task Force Report (2014)
- Rolling resource documents on [notalone.gov](http://notalone.gov)



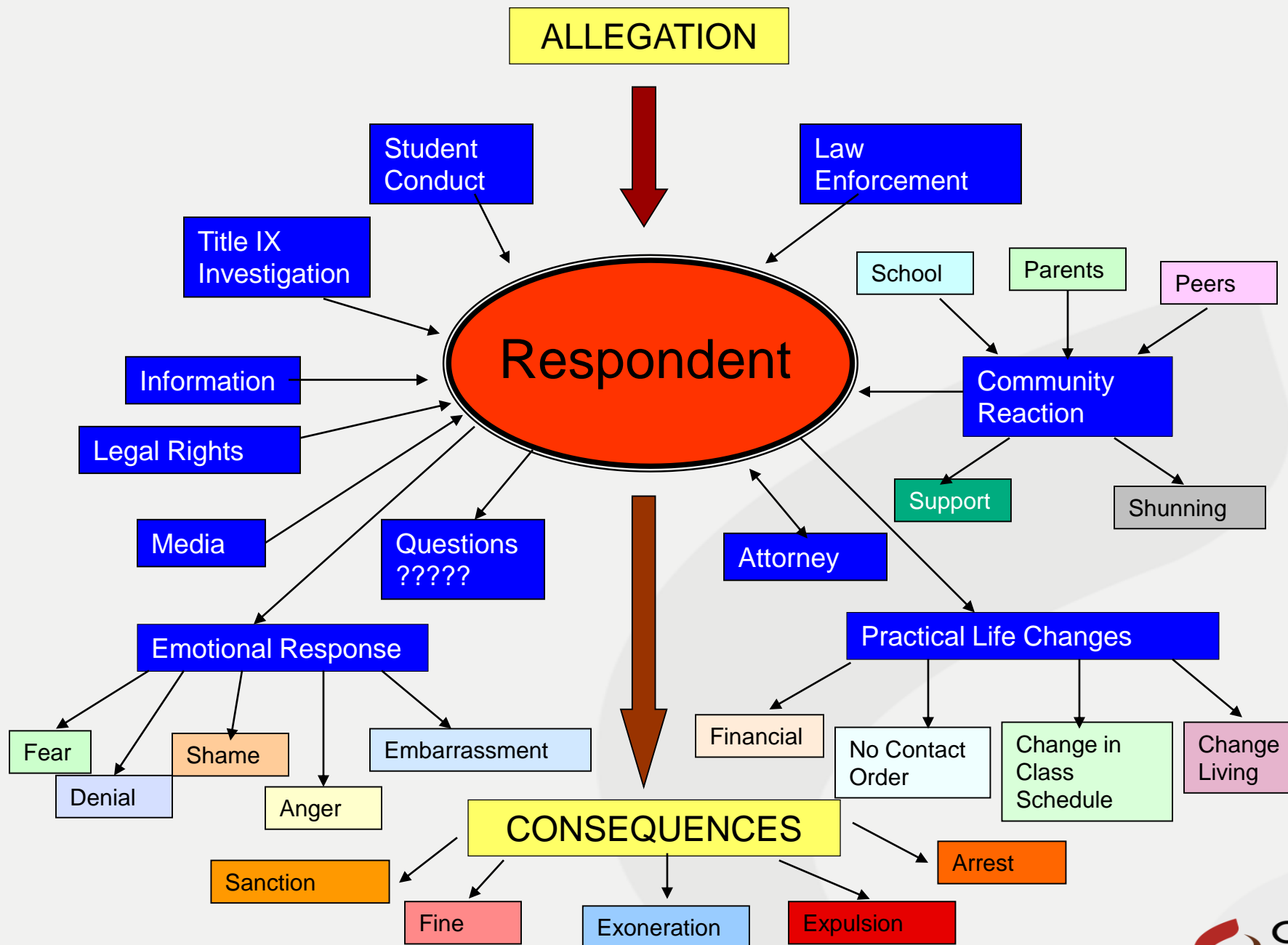
# Evolution of Federal Guidance, Legislation and Enforcement Efforts



# The Challenge of the Context







# Your Institution

- “Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”

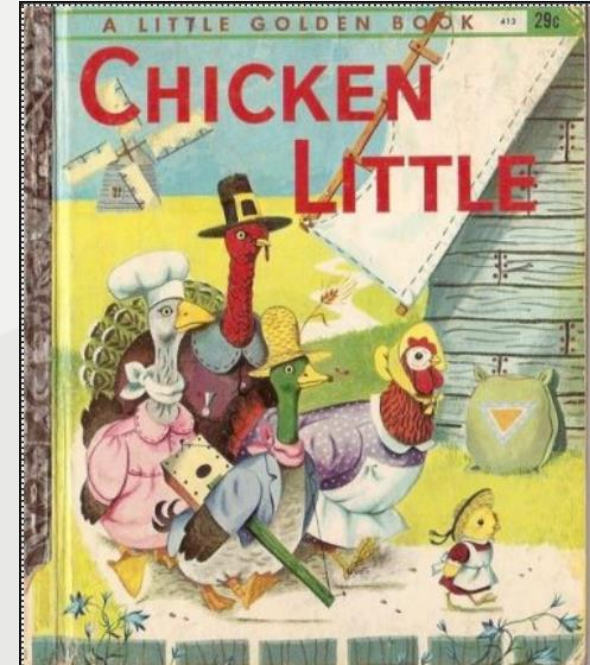
*Department of Education Office for Civil Rights  
2001 Revised Sexual Harassment Guidance*

- Institutions have broad discretion in policies, procedures, structure and personnel

# **DUE PROCESS: WHERE WE'VE BEEN**

# Caveat Emptor

- Not all courts are created equal
  - U.S. Supreme Court
  - Federal Circuit Courts
  - U.S. District Courts
  - State Appellate Courts
  - State Trial Courts
- Not all cases are created equal
  - Precedential, binding
  - Non-precedential, non-binding
- Every jurisdiction is unique and case law may not have broader legal applicability



# Nature of the Protection

- 14<sup>th</sup> Amendment states that no one may be deprived of life, liberty or property without **due process** of law
  - Public institutions are subject to limitations on state actions set by the United States and state constitutions
  - Private institutions are subject to the common law right to a fair procedure
- Foundational principles of due process
  - **Notice**
  - **Meaningful opportunity to be heard**
- Traditionally due process case law has been relatively stable, with great deference to academic institutions



# Due Process on Campus

- ***“The fundamental requisite of due process of law is the opportunity to be heard.”***
  - *Goss v. Lopez*, 419 U.S. 565, 577-579 (U.S. 1975)
- ***If “rudimentary elements of fair play” are followed, the requirements of due process of law will have been fulfilled.***
  - *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).

# Dixon v. Alabama (1961)

- Widely-cited case involving expulsion from a public university, where the factual basis for the expulsion was disputed
- Notice “should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the [institution].”
- Opportunity to be heard:
  - “A hearing which gives the...administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required”

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961).

# Dixon v. Alabama (1961)

- Opportunity to be heard:
  - “The student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies.”
  - “He should also be given the opportunity to present to the [deciding officials], or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.”
  - “If the hearing is not before the [deciding officials] directly, the results and findings of the hearing should be presented in a report open to the student's inspection.”

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961).

# Due Process on Campus

- **In the context of student discipline, due process requires only “notice and a [meaningful] opportunity to be heard.”**
  - Smith v. The Rector and Visitors of the University of Virginia, 78 F. Supp. 2d 533 (WD Va. 1999) (citing Dixon v. Alabama State Bd. of Educ.); see also Keerikkattil v. Hhrabowski, 2013 U.S. Dist. LEXIS 135331, at \*18-19 (D. Md. Sept. 23, 2013)

# Due Process on Campus

- In sum, what “due process” is required in a particular situation has generally been a highly individualized factual determination dependent on:
  - the facts of each particular situation
  - the severity of the potential punishment
  - the nature of the proceeding

# **DUE PROCESS: WHERE WE'RE GOING**

# Notice

- **Doe v. Rectors and Visitors of George Mason University**
  - Order granting Plaintiff's motion for summary judgment and finding that the procedures followed by the University, a state entity, violated Plaintiff's due process rights.
  - The Court ruled that the University failed to afford Plaintiff with constitutionally adequate process—it did not provide Plaintiff with **notice of the full scope of the charges** against him, which in turn impacted his opportunity to be heard and put on evidence that addressed the context in which the charges arose.

149 F. Supp. 3d 602 (E.D. Va. February 25, 2016) Memorandum Opinion

# Notice

- **Doe v. Rectors and Visitors of George Mason University**
  - Administrators also had off-the-record and **ex-parte** meetings with the Complainant without informing the Plaintiff of what had transpired.
  - One administrator **assigned the appeal to himself** despite having had “extensive ex parte contact with [the Complainant] over the summer” and **admitted he had “prejudged the case.”**
  - Sanctions were also imposed on Plaintiff without a basis for the decision.
  - Court also held that the school had not followed its own procedures.



# Notice

- **Doe v. University of Southern California**
  - Order affirming in part and reversing in part trial court judgment that the USC violates due process principles by **not providing Respondent with evidence against him.**
  - Because USC is a private institution, the court relied upon "the common law right to a fair procedure" and not constitutional due process.
  - Respondent was deprived of adequate notice when the charges against the Respondent changed and he was not provided an adequate opportunity to defend his actions relating to the new charges.

246 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016), reh'g denied (May 2, 2016), review denied (Aug. 10, 2016)

# Notice

- **Doe v. University of Southern California**
  - Appellant alleged that she engaged in non-consensual sex in a group sexual encounter at a fraternity party, and that she engaged in sex with others after Respondent had left the room.
  - The University's investigation and report focused on alleged sexual assault by Respondent and whether Appellant consented to sexual contact with him.
  - When the case was appealed internally, the appeals panel determined that discipline was appropriate on a different theory, in particular, that Respondent had encouraged other students during the group encounter to slap Appellant's buttocks and endangered Appellant by leaving her in a room with other men.

246 Cal. App. 4th 221 (Cal. App. Ct. April 5, 2016), reh'g denied (May 2, 2016), review denied (Aug. 10, 2016)

# Opportunity to Be Heard

- **Doe v. Regents of the University of California**
  - Holding that Appellant was provided with **sufficient due process** during a hearing regarding sexual misconduct.
  - UCSD provided Appellant with a formal hearing before a hearing panel
    - The hearing procedures permitted Appellant to present information and evidence, including witnesses, and to ask questions.
  - Hearing panel relied on the investigation report in its findings despite the fact that no witnesses testified about the report.

5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017)

# Opportunity to Be Heard

- **Doe v. Regents of the University of California**
  - The Court found that while UCSD's procedures were not perfect, UCSD provided Appellant with **a full opportunity to present his defenses**, but he chose not to utilize the opportunities he was provided.
  - The Court had concerns that UCSD's **procedure has great potential to be unfair** to respondents
  - It was most troubled by the **limits placed on the Appellant's opportunity to cross-examine** the complainant, especially in response to the complainant's hearing testimony as well as by a procedure that **prohibits a respondent from receiving all information that may have a bearing on the complainant's credibility.**

5 Cal. App. 5th 1055 (Cal. App. Ct. Nov. 22, 2016), review denied (Feb. 15, 2017)

# Opportunity to Be Heard

- **Doe v. Brandeis University**

- The Court held that Plaintiff, an undergraduate student, plausibly alleged **a violation of basic fairness** where the University failed to provide Plaintiff, who was accused of sexual misconduct, with “a variety of procedural protections . . . many of which, in the criminal context, are the most basic and fundamental components of due process of law,” including **no right to notice of charges, counsel, confrontation of the accuser, cross-examination of witnesses, examination of evidence or witness statements, or an effective appeal.**
- The Court also critiqued the University’s Special Examiner Process, in which a “single individual was essentially vested with the powers of an investigator, prosecutor, judge, and jury”
- The Court remarked that the dangers of combining these powers in a single individual, with few rights to appeal and review, are “obvious.”

177 F.Supp.3d 561 (D. Mass. March 31, 2016) Memorandum and Order denying Defendant’s Motion to Dismiss.

# Opportunity to Be Heard

- **Doe v. Trustees of Boston College**
  - Memorandum and Order granting Defendant University's Motion for Summary Judgment.
  - The Court found that the University provided “**basic fairness**” when disciplinary process was in accord with University policies, Plaintiff student was given **prompt notice** of charge and factual allegations against him, he had benefit of attorney-advisor in **hearing** and could present testimony, and he received two reviews of the Board's decision.

2016 WL 5799297 (D. Mass. October 4, 2016)

# Opportunity to be Heard

- **Doe v. Baum**

- When suspension or expulsion are possible, due process mandates that a **hearing** be part of the adjudicatory process with the **opportunity to conduct cross-examination**.
- Respondent filed a lawsuit claiming that the institution's disciplinary process violated the Due Process Clause and Title IX.
- He argued that, since the university's decision turned on a credibility finding, the school was required to give him a hearing with an opportunity to cross-examine his accuser and adverse witnesses.

903 F.3d 575 (6th Cir. 2018)

# Opportunity to be Heard

- **Doe v. Baum**

- The Sixth Circuit held: “When **credibility** is at issue, the Due Process Clause mandates that a university provide accused students **a hearing with the opportunity to conduct cross-examination.**”
- It further concluded, “if a public university has to choose between **competing narratives** to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

903 F.3d 575 (6th Cir. 2018)



# Opportunity to be Heard

- **Doe v. Claremont McKenna College**
  - Appellant argued he was deprived a fair hearing because the accuser never appeared, thus denying him the opportunity to question her and assess her credibility.
  - The Court found that because Appellant was facing potentially severe consequences, the Committee's procedures should have included an opportunity for the Committee to assess the accuser's credibility by her appearing at the hearing either in-person or by video conference.

34 Cal. App. 5th 44, (Cal. Ct. App. 2018)

# Opportunity to Be Heard

- **Doe v. Allee (USC)**

- Appellant argued that he was wrongfully expelled from a private institution.
- “When a student accused of sexual misconduct faces severe disciplinary sanctions, and the **credibility** of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, **fundamental fairness** requires, at a minimum, that the university provide a mechanism by which the accused may **cross-examine** those witnesses, directly or indirectly, at a **hearing in which the witnesses appear** in person or by other means (e.g., videoconference) before a **neutral adjudicator** with the power to find facts and make credibility assessments independently.”
- “That fact finder cannot be a single individual with the divided and inconsistent roles.”

30 Cal. App. 5th 622, (Cal. Ct. App. 2019)

# **PROCEDURAL PROTECTIONS UNDER TITLE IX AND THE CLERY ACT**

# The Clery Act (As Amended by VAWA)

## Core Tenets:

- Governs a school's response to sexual assault, dating violence, domestic violence and stalking (and other crimes)
- Applies to Clery-defined crimes reported to **campus security authorities** that occur on Clery geography
- Requires **procedural** and educational components that do not fully align with Title IX requirements
- Requires reporting of crime statistics through
  - Daily crime log
  - Annual security report
- Includes a duty to warn/timely warnings

# VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- **Prompt, fair, and impartial process** from the initial investigation to the final result
- Conducted in a manner consistent with the institution's policies **and transparent** to the accuser and accused
- The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**
- The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present
- The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings

# VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- Officials are appropriately **trained** and do not have a **conflict of interest or bias** for or against the accuser or the accused
- The proceeding is completed in a **reasonably prompt timeframe**
- Explicit provision noting that institutions may extend their reasonably prompt deadlines for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused **receive simultaneous notification**, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final

# Understanding Title IX

## Core Tenets:

- When a school **knows or reasonably should know** of possible sexual violence, it must take **immediate** and appropriate steps to **investigate** or otherwise determine what occurred
- Requires grievance procedures for “**prompt and equitable**” resolution of student, employee and third party complaints
- If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to
  - **Eliminate** the hostile environment
  - **Prevent** its recurrence
  - **Address** its effects
- School must protect the complainant and ensure their safety as necessary, including taking **interim steps** before the final outcome of any investigation

# 2017 Q&A: Effective Grievance Procedures

- OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school
  - Provides **notice of the school's grievance procedures**, including how to file a complaint, to students, parents of elementary and secondary school students, and employees
  - Applies the grievance procedures to **complaints filed by students** or on their behalf
  - Ensures an **adequate, reliable, and impartial investigation** of complaints, including **the opportunity to present witnesses and other evidence**;



# 2017 Q&A: Effective Grievance Procedures

- Designates and follows a **reasonably prompt time frame** for major stages of the complaint process
- Notifies the parties of the **outcome** of the complaint
- Provides assurance that the school will take steps to **prevent** recurrence of sexual misconduct and to **remedy** its disciplinary effects, as appropriate

# 2017 Q&A: Equitable Investigation

- The **burden is on the school** – not the parties – to gather sufficient evidence to reach a **fair, impartial** determination as to whether sexual misconduct or a hostile environment has occurred
- Requires a **trained investigator** to analyze and document the available evidence to support reliable decisions, **objectively evaluate the credibility** of parties and witnesses, synthesize all available evidence and take into account the unique and complex circumstances of each case
- Investigator must be free from actual or perceived **conflicts of interest** and **biases** for or against any party

# 2017 Q&A: Equitable Investigation

- Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on **equal** terms.
- The reporting and responding parties and appropriate officials must have **timely and equal access to any information** that will be used during informal and formal disciplinary meetings and hearings.

# 2017 Q&A: Equitable Investigation

- **Written notice** to a respondent of the allegations constituting a potential violation should include “sufficient details and with sufficient time to prepare a response before any initial interview.”
- Notice should include:
  - The identities of the parties involved
  - The specific section of the code of conduct allegedly violated
  - The precise conduct allegedly constituting the potential violation
  - The date and location of the alleged incident.

# 2017 Q&A: Equitable Investigation

- The investigation **should** result in a **written report** summarizing the relevant **exculpatory and inculpatory** evidence.
- The parties should have the **opportunity to respond to the report in writing** in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

# 2017 Q&A: Adjudication Procedures

- Investigator or separate decision-maker, **with or without a hearing**, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of school policy
- The decision-maker(s) must offer each party the **same meaningful access to any information** that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.

# 2017 Q&A: Adjudication Procedures

- Any process made available to one party in the adjudication procedure should be made **equally available** to the other party, for example
  - Right to have an attorney or other advisor present
  - Right to participate in an interview or hearing
  - Right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses
- Avoid **conflicts of interest and biases** in the adjudicatory processes and prevent institutional interests from interfering with the impartiality of the adjudication

# 2017 Q&A: Notice of Outcome

- OCR recommends that a school provide **written notice of the outcome** of disciplinary proceedings to the reporting and responding parties concurrently.
- The content of the notice may vary depending on the underlying allegations, the institution, and the age of the students.



# On the Horizon

- November 2018: Notice of Proposed Rulemaking
- Close to 120,000 comments received by OCR
- No date for final rule in sight
- Significant litigation and perhaps legislation anticipated
- Too early to predict content of final rule

# 2018: Notice of Proposed Rulemaking

- Basic requirements for grievance procedures
  - Treat complainants and respondents equitably.
  - An equitable resolution for a respondent must include due process protections before any disciplinary sanctions are imposed.
  - Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent or witness

# 2018: Notice of Proposed Rulemaking

- Basic requirements for grievance procedures
  - Require that investigator or decision-maker not have a conflict of interest for or against a complainant or respondent
  - Training for investigators and decision-makers to promote impartial investigations and adjudications that protect the safety of students, ensure due process protections for all parties, and promote accountability
  - Include a presumption that a respondent is not responsible

# 2018: Notice of Proposed Rulemaking

- Basic requirements for grievance procedures
  - Include reasonably prompt time frames
  - Describe range of sanctions and remedies
  - Describe standard of evidence
  - Include procedures and permissible grounds for appeal

# 2018: Notice of Proposed Rulemaking

- Notice
  - Written notice to the responding party must include the following details (if known):
    - The identities of the parties,
    - The specific section of the code of conduct at issue,
    - The precise conduct allegedly constituting the potential violation, and
    - The date and location of the alleged incident.
  - Sufficient time to prepare a response before any initial interview
  - Ongoing requirement to provide amended notice if additional policy violations uncovered

# 2018: Notice of Proposed Rulemaking

- Timely and equal notice
  - Equal opportunity to inspect and review any evidence, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation
  - Recipient must send to each party and their advisor the evidence subject to inspection and review in an electronic format
  - Disseminate investigative report that fairly summarizes relevant evidence

# 2018: Notice of Proposed Rulemaking

- Hearing
  - Must provide for a live hearing
  - Decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow up questions, including those challenging credibility
    - Cross-examination must be conducted by the party's advisor of choice
    - Questions can be reviewed by an administrator
    - Decision-maker must explain to the party's advisor any decision to exclude questions as not relevant.

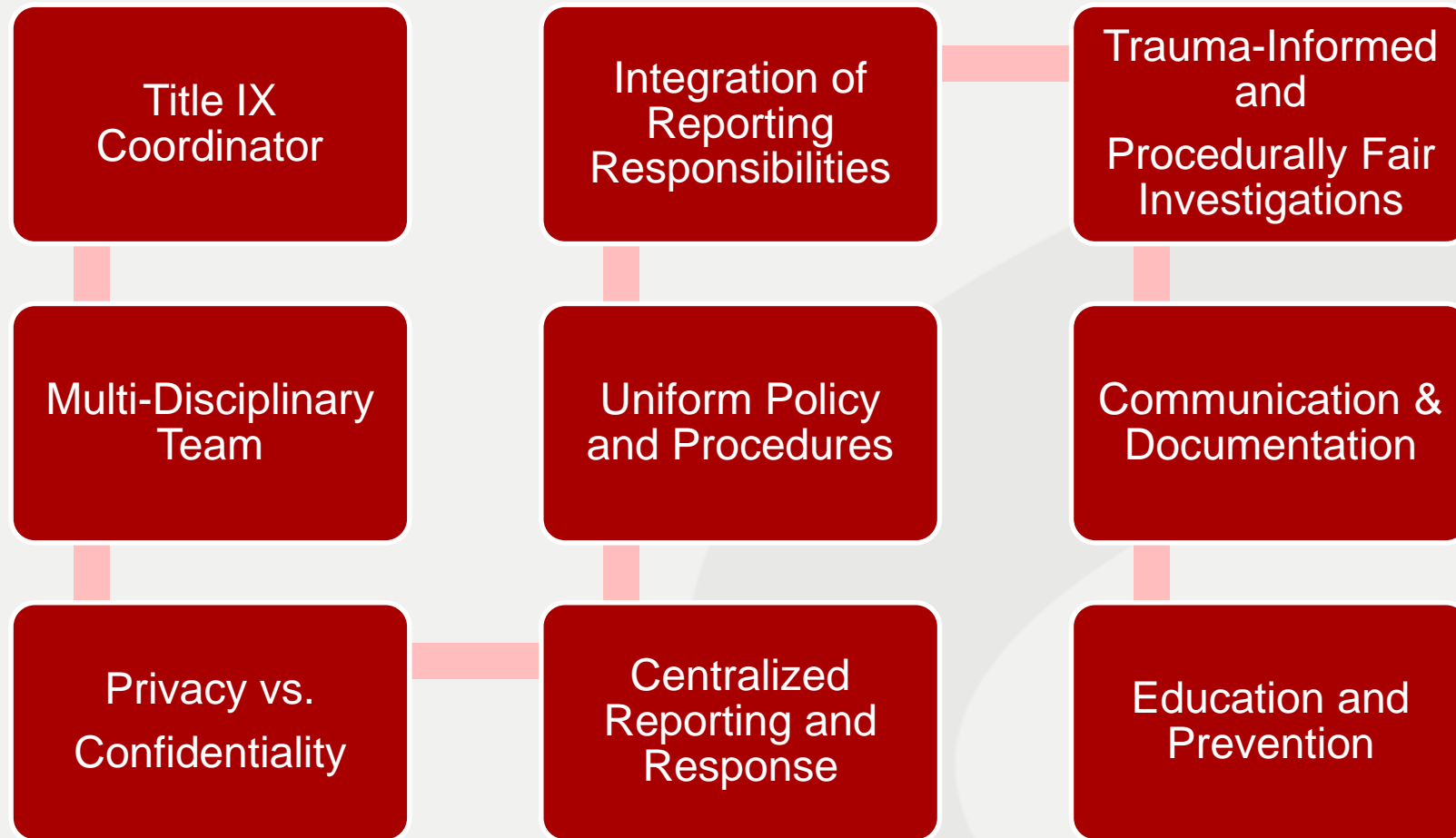
# 2018: Notice of Proposed Rulemaking

- Hearing
  - If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility

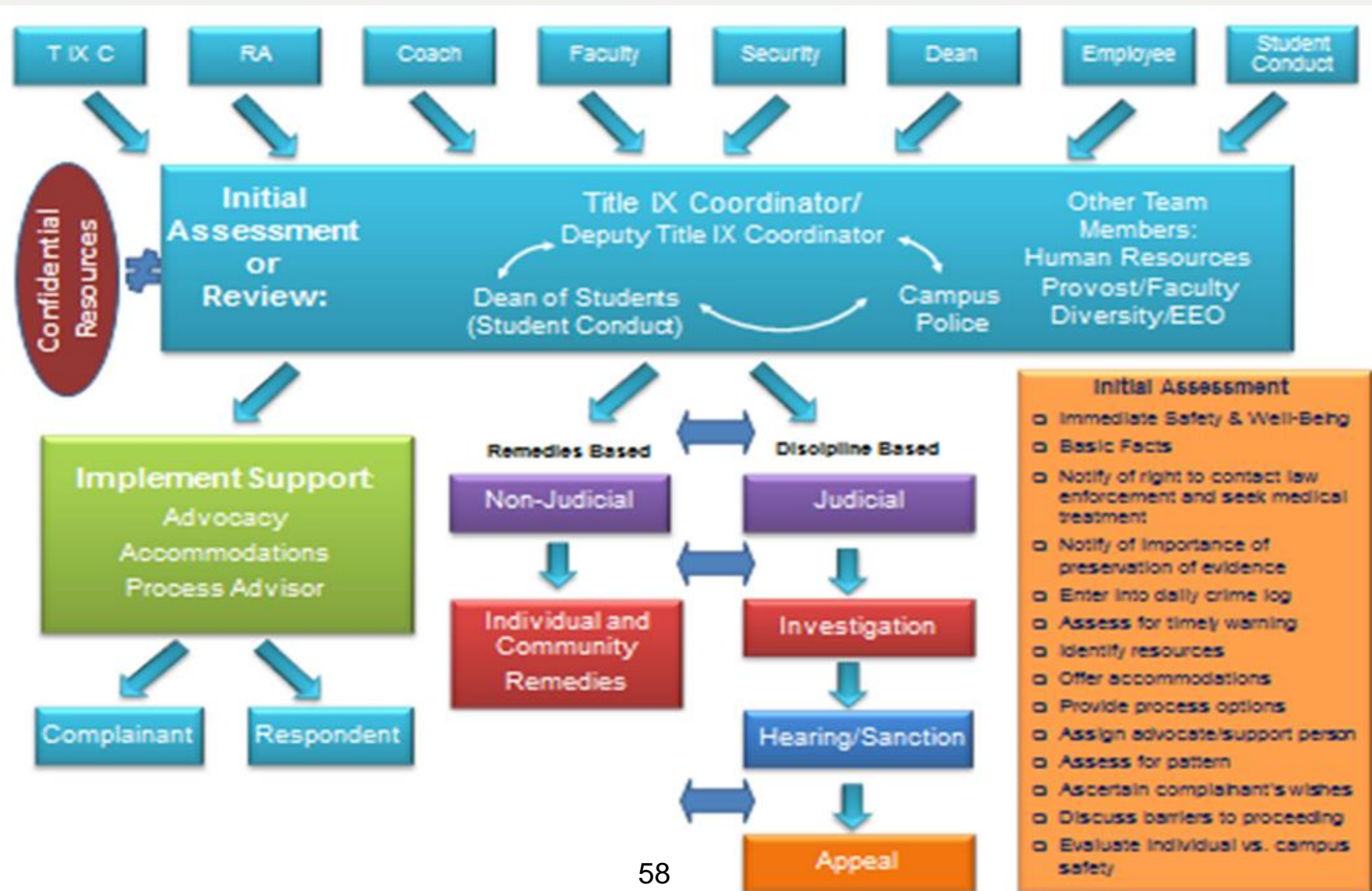


# **EFFECTIVE PRACTICES AND INVESTIGATIVE MODELS**

# Key Elements of Effective Practices



# Integration and Coordination



# Effective Investigative Protocols

- Written notice of investigation
  - Include identifying information for complainant
  - Issue amended notice as needed
- Use consistent interview guide/template for consistency
- Permit witness to review witness statement
- Allow witness to propose questions to investigator
- Ensure equal and timely access to information that will be used
- Allow parties to review draft report and submit feedback in response to report
- Final written report (may include finding, recommended finding, or synthesis of facts only)

# Investigative Models

- All investigative models must incorporate a robust investigation to reinforce reliability
- The conduct of the investigation is critically important to reinforce neutrality, objectivity and competence
- Investigator may
  - Synthesize facts, but make no findings
  - Make a threshold/preliminary determination
  - Make a recommended finding that the parties can contest
  - Make a finding re: policy violation
  - Make a finding re: policy violation and sanction

# Adjudicative Models

- Continuum of decision-making authority
  - Single investigator model
  - Hybrid model (review panel)
  - Hearing model
- Choice of adjudicator
  - Administrator
  - External professional
  - Panel of faculty or staff
- Choice of disciplinary authority
- Choice of appellate authority

# Hybrid Model

- Adjudicator does not make “de novo” finding
- Either party can contest the investigative finding
- Review panel will determine some version of:
  - Whether there was a material procedural error that substantially impacted the outcome
  - Whether the preponderance of the evidence standard was appropriately applied (sufficiency)
  - Whether the concerns raise substantial doubt about the thoroughness, fairness and/or impartiality of the investigation
- Review panel then determines sanction
- May or may not be followed by an appeal
- Examples: University of Virginia, Baylor University, Dickinson College

# Pros and Cons of Hearing Panels

## Pros

- Shared decision-making with community stakeholders
- Can bring multi-disciplinary perspective to the issues
- With professional hearing chair, can run smoothly and efficiently

## Cons

- Difficult to maintain consistency in training and understanding of issues
- Significant bureaucratic challenge to organize
- Often relies upon volunteer community members
- Concern about bias



# **STABLE MOORINGS IN A TIME OF GREAT UNCERTAINTY**

# Implementation Rubric

- Law
- Regulations
- Guidance
- Policy
- Higher Education Experience
- Institutional Values

# Stay the Course

- Integrate current regulatory framework
  - 2017 Q&A on Campus Sexual Misconduct
  - 2001 Revised Sexual Harassment Guidance
- Update investigation procedures
  - Notice and an opportunity to be heard
  - Written notice of investigation
  - Timely and equal access to any information that will be used
  - Written investigation report – preliminary and final
- Documentation – show your work!

# Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

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